

COMMONWEALTH OF MASSACHUSETTS

LAND COURT
FILED

2019 JAN -3 PM 3:20
LAND COURT

BARNSTABLE, ss.

CASE NO. [

]

PAUL TEIXEIRA, as Trustee of 116
BRADFORD STREET CONDOMINIUM
TRUST and INDIVIDUALLY,

Plaintiff,

v.

CAPE COD PILGRIM MEMORIAL
ASSOCIATION, PLANNING BOARD OF
THE TOWN OF PROVINCETOWN, and
DAVID ABRAMSON, JOHN GOLDEN,
ALBERT CAREY, and PAUL GRAVES, as
they all are or were members of the Planning
Board,

Defendants

COMPLAINT PURSUANT TO
G.L. c. 40A, § 17

Introduction

This is an appeal pursuant to G.L. c. 40A, § 17 by plaintiff 116 Bradford Street Condominium Trust ("the Trust") through its trustee, Paul Teixeira, the decision ("Decision") of defendant Planning Board ("the Board") to approve the application of defendant Cape Cod Pilgrim Memorial Association for Site Plan Review and Special Permit under Article 2, Section 4010 of the Provincetown Zoning By-laws for construction of a new entrance to the existing monument and museum via an inclined elevator to be located on Bradford Street, directly abutting the Trust's property. The Trust is aggrieved by the Board's decision, which will create significant adverse impacts on the Trust's property and legal rights and interests. The Board's decision exceeds its authority, is not supported by evidence, is arbitrary or capricious, and should be annulled.

Parties, Jurisdiction and Venue

1. Plaintiff 116 Bradford Street Condominium Trust, through its Trustee Paul Teixeira, owns the property located at 116 Bradford Street, consisting of three condominium units, all of which directly abut the property on which the proposed inclined elevator is to be located. Mr. Teixeira owns and seasonally resides at Unit 2, which is located directly adjacent to the course of the inclined elevator. The Trust and Mr. Teixeira are aggrieved by the Board's Decision approving the application of defendant Cape Cod Pilgrim Memorial Association ("CCPMA") for Site Plan Review.

2. Defendant Board is a duly constituted municipal body with a usual place of business at Town Hall, 260 Commercial Street, Provincetown, Massachusetts.

3. The names and addresses of the defendant members of the Board are:

David Abramson, chairman, 260 Commercial Street, Provincetown, Massachusetts.

John Golden, 260 Commercial Street, Provincetown, Massachusetts.

Albert Carey, 260 Commercial Street, Provincetown, Massachusetts.

Paul Graves, 260 Commercial Street, Provincetown, Massachusetts.

4. Upon information and belief, defendant Cape Cod Pilgrim Memorial Association ("CCPMA"), which owns the Bradford Street property, is a Massachusetts non-profit organization body with a usual place of business at 1 High Pole Hill Road, Provincetown, Massachusetts.

5. Jurisdiction and Venue are proper in this Court pursuant to G.L. c. 40A, § 17.

Facts

6. Upon information and belief, CCPMA owns and operates the Cape Cod Pilgrim Memorial, located at 1 High Pole Hill Road in Provincetown, and on April 25, 2018 filed an

application with the Board for Site Plan Review under the Provincetown Zoning By-laws ("By-laws") under Article 2, § 2320 and Article 4, § 4010 for construction of a new entrance to the existing monument and museum via an incline elevator from CCPMA's property on Bradford Street to the monument grounds at the top of High Pole Hill Road.

7. The incline elevator is a 50-ton mechanism consisting of one elevator car with capacity for 18 passengers, plus tracks, helical piers, and a mechanical building housing the machine room and docking platform, which building is to be located at the edge of High Pole Hill.

8. Presently, the monument grounds are accessed by vehicular traffic by driving to the top of the monument property where there is a large parking lot with free parking. Pedestrians may reach the monument and museum by using Winslow Street and High Pole Hill Road to walk to the memorial and museum.

9. The Project is expected to add significant traffic to an already congested area in the vicinity of the Trust property. In addition to the local traffic drawn to the area by the attraction of the incline elevator, there will also be a regional impact from the Project as it is to be the first in a series of "Pilgrim Locators" directing travelers on a 113-mile pilgrimage to sites along the Cape en route to Boston.

10. The incline elevator is expected to start operating as early as 8:00 a.m. and not end until approximately 11:00 p.m., when the last event of the evening is completed, which could be as late as after midnight. At last count, there were approximately 50 evening events at the museum in 2018. Approximately 400 people per hour are expected to use the elevator on a summer day.

11. The Board opened the hearing on September 27, 2018, which hearing was continued on October 25 and December 13. After the public hearing closed on December 13, the

board unanimously voted to approve the Project. A true, certified copy of the Decision, which was filed with the Town Clerk on December 18, 2018, is attached as Exhibit A.

12. No geologic study demonstrating that the edge of the dune hill can support the 50-ton incline elevator mechanism, particularly the mechanical building and docking platform. A geologic report by Terracon that was filed with the Conservation Commission for related approvals was based on a geologic study for a stairway, and not the 50-ton mechanism that is the incline elevator. Although Terracon provided an addendum stating that the helical piers would strengthen slope stability they did not analyze or discuss the impacts on the stability of the hill's edge from excavation and construction of the mechanical building and the underground components that will be pulling 50 tons of machinery up and down the hill for potentially hundreds of trips per day.

13. No alternatives to the incline elevator were presented to the Board. While an electric shuttle bus was mentioned as an alternative, it was rejected due to traffic concerns in this already heavily congested area.

14. The CCPMA should have also considered the alternative of using a docent at the outdoor museum who could direct visitors to High Pole Hill or Winslow Street to access the monument or the museum. For visitors with physical limitations or those who prefer to ride up to the monument grounds, the docent could call the shuttle bus to pick up and transport visitors to the museum grounds at the top of the hill on an as-needed basis.

15. In spite of the expected traffic increase, the Board failed and refused to require a traffic study before voting to approve the application.

16. The Board also failed and refused to conduct a site visit as requested by Mr. Teixeira to see the proximity of the elevator to the Trust's property.

17. The Trust's property abuts the CCPMA property, which is presently consists of an unused wooded area of the dune ending with a chain link fence and the hill to the monument grounds. Presently, no person has need to use this area.

18. The incline elevator and related machinery and mechanical building are expected to overrun and shadow the existing tranquility of the hill, disrupting the Trust's and Mr. Teixeira's quiet enjoyment of their property and quality. The inclined elevator tracks will be as close as nine feet from the property line, and people are expected to be gathering as closely as four feet to the Trust's property waiting to ride the elevator.

19. The incline elevator is expected to bring hundreds of people within four feet of the Trust's property at all hours of day and night, with the attendant traffic, noise, and invasion of privacy for the Trust's unit owners.

20. The proposed incline elevator is expected to cause a diminution in the value of the Trust's property and Mr. Teixeira's unit, which is presently listed for sale and has received no binding offers due to the incline elevator and uncertainty over the myriad adverse impacts to the unit.

21. The Trust and Mr. Teixeira are aggrieved by the Board's decision, which has already adversely impacted their legal and property rights and interests.

22. The Board's decision fails to consider or address the multiple adverse impacts from the proposed incline elevator, including public safety issues over the stability of the hill, excessive traffic, noise, and diminution to the Trust's property value.

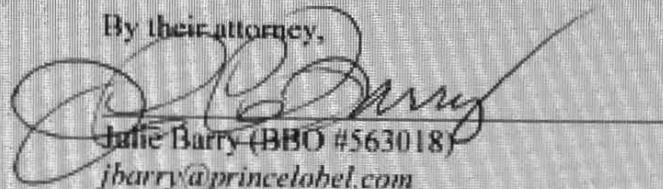
23. The Board's decision exceeds its authority and discretion under the Zoning By-laws and G.L. c. 40A, § 17, is not supported by evidence, is arbitrary or capricious, and is otherwise not in accordance with the law, and should be annulled.

PRAYER FOR RELIEF

Plaintiffs request that this Court annul the Board's Decision, and issue such other and further relief as this Court deems just and proper.

PAUL TEIXEIRA, AS TRUSTEE OF THE 116
BRADFORD STREET CONDOMINIUM TRUST,
AND INDIVIDUALLY.

By their attorney,

A handwritten signature in black ink, appearing to read "Julie Barry", is written over a horizontal line. The signature is fluid and cursive.

Julie Barry (BBO #563018)

jbarry@princelobel.com

Prince Lobel Tye, LLP

One International Place, Suite 3700

Boston, MA 02110

(617) 456-8090

Dated: January 3, 2019

EXHIBIT A

**Town of Provincetown
Planning Board
Town Hall
Provincetown, MA 02657**

FINDINGS AND DECISION OF THE PLANNING BOARD

December 13, 2018

Case No.: FY18-29
Applicant/Owner: Cape Cod Pilgrim Memorial Association
PO Box 1125, Provincetown, MA 02657
Property: 1 High Pole Hill Road, Provincetown, MA 02657
Assessor's ID: Map 12-1, Parcel 27
Registry: Book 256, Page 426

The Town of Provincetown Planning Board (Board) hereby approves the application of Cape Cod Pilgrim Memorial Association (Applicant) for Administrative Site Plan Review under the Town of Provincetown Zoning By-laws (By-laws) Article 2, §2320 and Article 4, Section 4010 for the construction of a new entrance to the existing monument and museum via an incline elevator (commonly called "funicular") from the Applicant's property along Bradford Street to the top of High Pole Hill Road (Project). This decision is rendered pursuant to a vote of the Board on December 13, 2018.

The application for the Project was received on April 25, 2018. Board members David Abramson, Albert Cary, John Golden and Paul Graves sat on the case. Albert Cary was not present at the first hearing, but reviewed the video recording of that hearing and certified such in writing. On September 27, 2018 the Board opened the public hearing, the Applicant presented the Project, testimony was taken, charges and additional materials were requested, and the Board continued the public hearing.

The Project was heard again by the Board on October 25, 2018. At the continued public hearing the Board reviewed additional information, took testimony, requested additional information with a particular focus on traffic data, and continued the public hearing.

The Project was heard again by the Board on December 13, 2018. At the continued public hearing, the Board reviewed additional information, took testimony, closed the public hearing, deliberated, and voted to approve the Project with all in favor. The motion required 3 votes in favor, thus the motion passed and the Project was thereby approved.

FINDINGS

The Board finds as follows:

1. The Site is located along Bradford Street on a portion of the Property disconnected from the monument grounds by the slope of High Pole Hill. The Site is currently undeveloped.

2. The Project as proposed consists of a new entrance to the existing monument and museum via an incline elevator (commonly called "funicular") from the Site to the monument grounds at the top of High Pole Hill. The Project is proposed in accordance with the following plans and supporting documents:

- Sheet C1.2.1: *Cape Cod Pilgrim Memorial Association, Plan Showing Proposed Site Improvements, Revised Layout Scheme A*, prepared by Roger P. Michniewicz, Coastal Engineering Company Inc., as revised 9/17/18
- Sheet L1.2: *Bradford Access Project, Submission Planting Plan A*, prepared by Hawk Design, Inc., as revised 9/7/18, attached hereto as Exhibit A
- *Proposed Bradford Street Access Project for Pilgrim Monument & Provincetown Museum Option A*, concept plan and elevations, consisting of 5 sheets, prepared by Brown Lindquist Fenocchio & Raber Architects, Inc., dated 9/19/18, attached hereto as Exhibit B
- *Stormwater Management Report for Proposed Funicular System & Associated Site Improvements*, including an Operations and Maintenance Plan, prepared by Roger P. Michniewicz, Coastal Engineering Company Inc., dated 12/3/18, attached hereto as Exhibit C
- *Pilgrim Monument (Bradford Street Access)*, lighting plans and fixture schedule, consisting of 4 sheets, prepared by Brian Orter Lighting Design, LLC, dated 10/25/18, attached hereto as Exhibit D

3. The Applicant submitted additional supporting documentation including but not limited to the following:

- *Pilgrim Monument Funicular Traffic Evaluation*, prepared by McMahon Associates, dated 10/12/18
- *Pilgrim Monument Funicular Traffic Evaluation*, addendum to previous report, prepared by McMahon Associates, dated 11/28/18
- *Geotechnical Engineering Report, Pilgrim Monument*, prepared by Terracon Consultants, Inc., dated 10/19/15
- *Geotechnical Engineering Services, Provincetown Monument*, memorandum, prepared by Terracon Consultants, Inc., dated 9/27/18
- *Funicular Sound Studies Review and Summary*, prepared by Cavanaugh Tocci, dated 6/28/18

4. The Board considered a peer review of the traffic information submitted by the Applicant in a technical memorandum prepared by the Town's transportation engineers, Environmental Partners Group, dated 12/11/18
5. The Project was reviewed on the review criteria as listed in Sections 2320 and 4035 of the By-laws.
6. The Applicant has requested, and the Board grants, a waiver from the review criteria of §4163 Residential Design standards as they are not applicable to the Project.
7. The Board found that the Project as proposed meets the following applicable review criteria:
 - §2320-C(2)(a) related to visual impacts
 - §2320-C(2)(b) related to stormwater
 - §4035(a) related to the Local Comprehensive Plan
 - §4035(e) related to unique features of the site

- §4035(g) related to flood hazard mitigation
 - §4035(h) related to lighting
 - §4053(2)(b) related to landscaping requirements
 - §4053(2)(d) related to landscaping requirements
 - §4053(3) related to design and appearance
 - §4053(4)(a) related to erosion control
 - §4053(4)(b) related to stormwater management
 - §5331(c) related to stormwater management
 - §5331(d) related to cutting of vegetation
8. The Board found that the Project as conditioned herein meets the following applicable review criteria:
- §4053(1)(a) related to traffic impacts
 - §4035(d) related to detrimental impacts to the public and abutters, here traffic
 - §4035(f) related to traffic impacts
 - §5331(e) related to traffic impacts
 - §5331(g) related to burdens on public service, here police management of traffic
9. The Project as conditioned conforms to the By-laws and the review criteria therein.
10. The Board approved the Project subject to the conditions herein.

CONDITIONS

The Board approves the Project subject to the following conditions:

1. The Project shall be constructed and maintained in accordance with the plans and other documents referenced herein.
2. Prior to issuance of a Building Permit sign-off, the Applicant shall develop and conduct a monitoring program during the months of July and August of 2019 to gather data on traffic volume, vehicle queuing, turning motions, and bicycle and pedestrian movements at the Ryder and Bradford Streets intersection. The monitoring shall be undertaken during the summer season and include at least two (2) mid-day Saturday timeframes, including one (1) occurring during a day in which the Farmers' Market occurs, and two (2) week day afternoons. Additional monitoring shall occur on the Fourth of July and day of the Carnival Parade. The data collected shall be summarized in a report detailing observed baseline conditions, conditions which would exceed baseline by 50%, and real-world measures that can be used to determine when these conditions exist. The report shall be submitted to the Town for review and approval by staff.
3. After completion of the Project and during hours of operation, Town Administration or the Chief of Police shall have the ability to require the Applicant to pay for a traffic detail at the intersection of Bradford Street and Ryder Street if observed traffic congestion exceeds 50% of baseline conditions for a continuous period of at least 30 minutes.
 - a. The Applicant may at any time request a modification of any provision of this condition for administrative approval by the Planning Board. Any requests must be substantiated by supporting documentation.
4. The Applicant shall coordinate with Town staff to develop final designs for the improvements shown on the plan titled *Concept Plan, Cape Cod Pilgrim Memorial Funicular*, prepared by McMahon Associates, dated 12/1/2018, attached hereto as Exhibit F. The Applicant shall request

permission from the Provincetown Select Board to construct these physical improvements once final designs have been developed.

- a. Prior to issuance of a Building Permit sign-off, the Applicant shall construct those improvements which have been approved by the Select Board. If the Select Board does not approve any of the improvements, this condition shall be met.
5. The Applicant shall work with the Town Planner to develop plans for a pedestrian-oriented wayfinding and informational sign at the northwest corner of Ryder Street and Commercial Street along Town Hall grounds to direct pedestrians along the sidewalk on the west side of Ryder Street. The Applicant shall apply to the Select Board for approval of the sign, and, if approved, the Applicant shall install the sign.
6. Museum signage at the Site shall be designed so as to be oriented toward pedestrians and not toward vehicular traffic.
7. A bicycle rack shall be provided on the Site for no less than 12 bicycles. Bicycle racks shall be of "post-and-ring" or "inverted u" type.

MOTIONS

The Town of Provincetown Planning Board voted to approve, with conditions, the Site Plan approval for application number FY18-29 based on the findings set forth above on December 13, 2018. The motion passed.

Motion: John Golden

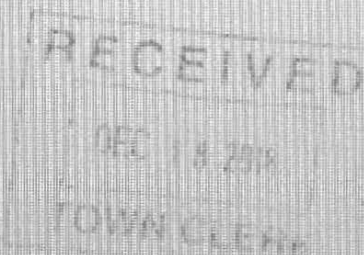
Second: Albert Carey Vote: 4-0-0

SIGNED BY:



David Abramson, Chair

DATE OF FILING:



A copy of this application will be on file in the Town Clerk's Office as well as the Department of Community Development.

The Special Permit issued hereunder shall not be valid until recorded at the Barnstable County Registry of Deeds as provided in MGL Chapter 40A.

Any appeal of this decision of the Planning Board can be made only to the Court and must be made pursuant to MGL Chapter 40A, Section 17, as amended, and must be filed within 20 days after the date of filing of the decision with the Town Clerk.

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Motion: John Golden

Second: Albert Carey Vote: 4-0-0

SIGNED BY



David Abramson, Chair

DATE OF FILING

RECEIVED
DEC 18 2018
TOWN CLERK

A copy of this application will be on file in the Town Clerk's Office as well as the Department of Community Development.

The Special Permit issued hereunder shall not be valid until recorded at the Barnstable County Registry of Deeds as provided in MGL Chapter 40A.

Any appeal of this decision of the Planning Board can be made only to the Court and must be made pursuant to MGL Chapter 40A, Section 17, as amended, and must be filed within 20 days after the date of filing of the decision with the Town Clerk.